PUBLIC SERVICE IRRIGATION COMPANIES.

Five years ago there was a paper in this REVIEW, by the present writer, upon "Public Control of Irrigation".[1] At that time throughout the country the movement for public control of public utilities of all kinds had become very strong. The present article concerns the five years since passed.

In looking over these five years it is proper, as in the other paper, to begin with the practical conditions found to exist. The United States at the beginning was building expensive works to irrigate large areas. Private capital was embarking, under the "Carey Act", and "Irrigation District" laws, upon enterprises which in size and expense rivalled those of the United States. In the rear of both public and private enterprises of merit, the usual wildcat schemes also came. The selling of irrigation bonds became the chief business of important brokerage houses, and investment in these securities was wide-spread in Europe and America. Between that time and this, few of the projects have been completed; many of them are bankrupt. Delays in settlement, greater construction costs than had been anticipated, smaller water supplies than had been estimated, the war and financial stringency combined to the result. The most meritorious enterprises cannot now be readily financed. Under these changing conditions public regulation had to make its beginning. Over irrigation companies it became active when, in and following the sessions of 1911, practically all of the irrigation states created Public Service Commissions or the equivalent.

In California especially the Commission (called "Railroad Commission") has been very active over irrigation companies. Control of such companies has come to occupy a large part of its time and work.

Contract basis of irrigation service has been cast out by the Commission. The Commission at the beginning ruled that contracts for service, which had so long controlled the field, were of no validity against such orders as the Commission might issue, and that it would be the same whether the contract or the order were made first.[2] It has, for some of the irrigation companies

[1] 10 Columbia Law Rev. 506.

[2] *In re* Murray and Fletcher 2 Cal. Ry. Com. 464. The Commission has reaffirmed this repeatedly since. See upon this question in the courts: Birmingham Co. *v.* Brown (Ala. 1914) 67 So. 613; Pinney etc. Co. *v.* Los Angeles Gas etc. Co. (1914) 168 Cal. 12 (holding: "a word perhaps

in this state, changed the contract rates (sometimes lowering and sometimes raising), and has laid down in some cases sets of rules and regulations very different from what were in the contracts. It has laid down in some matters, general rules of like tenor[3] applicable not merely to individual companies, but to all in the state (in effect, general laws). The "law in practice" (that is, the government of public irrigation distribution by the terms of contracts, along which the practice had so long drifted) was called sharply to a halt.

Among the irrigation changes ordered, the most important is that charges may cover only annual service; they cannot require payment for what was called the "water-right" to begin service,[4] nor for any water not used.[5] The irrigator is to pay for only what water he takes, like consumers of water in cities, consumers of gas, or shippers by rail. Heretofore the companies have very frequently charged for the "water-right", whether the irrigator used water thereafter or not. Where a large supply and a large demand are both assured, as in gas and railways, or water in cities, it is one thing, the companies say, but where the number of the company's possible customers is limited, as in most irrigation concerns, they say that the option of even a few of them to fail to take and pay for water may mean the difference between

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should be added touching the asserted violation of the provisions of the contract between the company and plaintiff by the enforcement of the terms of the regulatory ordinance. Upon this it is sufficient to say that it will be conclusively presumed that the parties contracted in contemplation of the power of the proper board or tribunal to fix rates in every case where such power exists and may have been thereafter legally exercised"); Murray *v.* City of Pocatello (1912) 226 U. S. 318; Green *v.* Jones (1912) 22 Idaho 560; Marin Water etc. Co. *v.* Town of Sausalito (1914) 168 Cal. 587; State *v.* Geiger (1912) 246 Mo. 74; McCook Co. *v.* Burtless (Neb. 1915) 152 N. W. 334 (holding that all contracts of public service companies are subject to legislative control); Raywood etc. Co. *v.* Erp & Wright (1912) 105 Tex. 161 (statute prevails over contract); State *ex rel* Raymond Co. *v.* Public Service Comm. (1915) 83 Wash. 130 (holding that under the Washington statute contracts for service are not void or voidable until the public service commission directs their termination). See Cal. Stat. 1913 c. 80 § 7, saying: "The language in section 1 of this act 'whether under contract or otherwise' shall not be construed as authorizing a contract by a person or corporation defined herein as a public utility which shall in any wise deprive the state or the railroad commission or other competent authority of power to regulate the rates and service of any such public utility."

[3]See Cal. Ry. Comm. Decision Number 2689, August 12, 1915.

[4]*In re* San Gorgonio W. Co. 2 Cal. Ry. Comm. 710.

[5]Rogers *v.* Sacramento Valley etc. Co. Cal. Ry. Comm. Decision Number 2483, June 14, 1915.

profit and loss in any year, and repeating, in every year. The Commission has conceded something to this argument.[6]

The demand that consumers sign contracts before receiving service is still general; the exaction in those contracts of the old forms of stipulations and charges is still going on, and farmers as a rule accept that and say nothing rather than have litigation. Whether it be before a court or the Railroad Commission, the bulk of consumers avoid "taking the law" on anyone; and the actual change of practice has not yet come into the effect that the repeated and strong rulings of the Commission would at first sight indicate. The question of how far an industry built in practice upon one plan can by courts, statutes, constitutions or commissions be made to conform to a different plan, which was considered in the former paper, is now being answered by experience. In this respect probably the change is not different, except in degree, from that which is being effected in most industries throughout the country. There has been a good beginning.

In defining the kinds of water companies within the Commission's control, an issue of another kind has appeared. The Railroad Commission opposes the Supreme Court's definition of the line between the companies that the Commission may, and those that it may not, control. The Commission was established by Constitutional amendment containing a clause which states that the authority of the legislature to confer powers upon the Commission is "plenary and unlimited by any provision of this Constitution."[7] The Supreme Court of the State construed this to mean such powers only as are cognate to the regulation of public utilities.[8] The Commission has not objected to the qualification restricting it to the field of public utilities. It has, however, taken issue very strongly with the court upon the question of what are public utilities.

The Railroad Commission's view is shown by a statute of which it secured the passage, declaring "any person" who "delivers water to any person" to be a public utility and subject to the control of the Railroad Commission.[9] The Supreme Court holds, however, that a public utility subject to regulation can be only such as voluntarily dedicated its property to the use of the public;

[6]Cole *v.* Feather R. R. 4 Cal. Ry. Comm. 1392.

[7]Cal. Const. Art. XII, Sec. 22.

[8]See Pacific Telephone etc. Co. *v.* Eshleman (1913) 166 Cal. 640.

[9]Cal. Stat. 1913 Ch. 80, Sec. 1.

that a statute forcing an owner to submit to have the public use his property against his will takes *pro-tanto* his property from him and is invalid under the Constitution of the United States.[10] Unless there has been a voluntary dedication by the owner to public use, jurisdiction of the Railroad Commission is denied. The matter arose particularly as follows:

The California Development Company (herein called the parent company) was organized April 23, 1896, to irrigate the Imperial Valley (then a desert) in California, by water from the Colorado River. By one subsidiary called the Mexican Company it operated its main canal on the Mexican side of the California boundary line, and by a number of other subsidiaries (called "Imperial Water Companies") which were formed to receive the water from the "Mexican Company" at the international boundary line, the distribution was to be made to settlers by means of a canal system in California whose title the parent company retained in itself. Before receiving any water the settler had to become a stockholder in one of the Imperial Companies, the land to be irrigated being described in his certificate of stock, the number of certificates being governed by the amount of irrigable land in the project. The land at the beginning was public land (none belonged to the parent company).

The parent company on March 15, 1901, arranged between its subsidiaries that the Mexican Company was to deliver a certain amount of water annually to the Imperial Company Number Five, and in return was to have the exclusive sale of this Imperial Company's capital stock to settlers, the proceeds going into the Mexican subsidiary's treasury; and on December 24, 1901, the Mexican subsidiary turned over this power of sale, with the right to the proceeds, to the parent Development Company. There were elaborations. The same arrangement was made as to the other Imperial subsidiaries, of which there were twelve at the beginning. The land (theretofore useless desert) cost the settler little or nothing, as he took it up under the Federal Desert Land laws. The land was worthless without the irrigation system; all the value at the beginning was in the water and canals. The

[10] "I think it cannot be doubted that an order compelling the owner of private property, against his will, to subject that property to the use of the public, or of an individual, amounts to a taking of property. For property consists, not of the tangible things, whether realty or chattels, over which dominion is claimed, but the right to possession or use of those things." Sloss J., in Pacific Telephone etc. Co. *v.* Eshleman (1913) 166 Cal. 640.

situation became this—the parent company, building and owning the irrigation system in California and Mexico, and having no land to sell, planned to get back the return of its investment and a profit, by selling to settlers at $15. to $25. per share water stock in its subsidiary Imperial Companies, and to cover the continuing annual cost of operation by the additional annual charge of 50 cents per acre-foot collected from the settlers through the Mexican Company.

After settlement had begun, the subsidiary Imperial Water Company Number Five had in it a considerable number of settler-stockholders and, a controversy having arisen, the parent Development Company waived its right to dispose of most of the stock of this subsidiary then remaining. The Development Company later claimed, however, that its agents made this waiver without authority, and brought an action in the Federal Court to set the waiver aside.

The United States Circuit Court granted the application. The United States Circuit Court of Appeals reversed this.[11] The elaborate arrangement was held ineffectual to cloud the substance of the matter, and in substance, whatever might be said of the form, the California Development Company was a public service company.[12]

Thereafter, in *Thayer* v. *California Development Company*[13] the Supreme Court of the State had to consider the status of the California Development Company (now one of the largest irrigation enterprises in the country) in the following connection:— In time the control of Imperial Water Company Number One had passed out of the parent company. All of its shares of stock had come to be sold to water users. Even so, it did not have stock enough. There remained not only further irrigable land in the vicinity, but also surplus water in the canal sufficient to irrigate it; the only impediment (speaking from the record as presented in the case) being the lack of shares of stock to cover it. Plaintiff, owning 40 acres of the excess land, for which there was plenty of water, demanded service. Because she was not a

[11]Imperial Water Co. *v.* Holabird (C. C. A. 9th., 1912) 197 Fed. 4, rehearing denied October 7, 1912.

[12]The court then denied the validity of any "water-right" charge by a public service company, (taking the same view as the California Railroad Commission has since taken), and rules that the charge on the sale of stock was a subterfuge to accomplish this illegal purpose and was void.

[13](1912) 164 Cal. 117.

stockholder, service was refused.[14] In proceedings for mandamus in which both companies were defendants, the refusal to supply her was upheld. The court ruled that neither the Imperial Company nor the Development Company was a public service company, because the arrangements never, it was held, put the parent company in the position of offering water to the public, but only to a few beneficiaries (The Imperial Companies), which in turn never occupied a public service position because they never offered water to any but their own stockholders as a private matter, following a type of well-known private service irrigation companies called "mutual companies". The ruling in the Federal Court was not referred to. The State Court's ultimate posititon is best summarized by itself in a later case[15] as follows:—

"Appellants try to bring themselves within the rules and principles declared in *Thayer* v. *California Development Co.* In that case it was held that the water right which a person gains by diversion from a stream for beneficial use is a private right and the water may not be demanded by the general public on payment of the legal fees until some act of dedication establishes the public use. Under the facts of that case it was held that the California Development Company had not dedicated the water in its irrigating system to a public use and that it might select and sell water to a class of consumers to the exclusion of others not belonging to that class."

The Railroad Commission of California nevertheless thereafter declared the California Development Company to be a public utility and stated its position as follows:—[16] "If the circumstances surrounding a particular business are such that the public has a special interest therein and that the general welfare demands public regulation and supervision thereof, the state has the right under its police power to find and declare the fact of the public interest and thereafter to regulate the business, entirely irrespective of whether its owners have 'held themselves out' as being public

[14]She tendered only the fifty cent annual maintenance charge. If she had tendered the equivalent in money of the price of the stock, probably she would have been arranged for even though there was no stock to give her; the controversy probably was at the bottom one of charges the same as in the Federal case.

[15]Byington *v.* Sacramento etc. Co. (Cal. 1915) 148 Pac. 791, at p. 794, holding its facts distinguishable from the other case.

[16]Becker *v.* Holabird Cal. Ry. Comm. Decision Number 1688, July 28, 1914, *per* Thelen, Commissioner. The Commission places special reliance upon German Alliance Ins. Co. *v.* Lewis (1914) 223 U. S. 389.

utilities, and without any 'dedication' except that they have engaged in that particular business, and without any compensation for any so-called 'taking', there being no taking in the constitutional sense."

A comparison of these three rulings relative to the same concern, shows the holdings to have been as follows:— By the State Supreme Court, there must be a voluntary dedication to the public use before one is a public service agency, and the California Development Company had successfully arranged its affairs so as to avoid any act of dedication; by the United States Circuit Court of Appeal, that the said arrangements were colorable only, and the Development Company was in substance dealing directly with the public and offering its service thereto through its agents, and the substance governed the form; by the Railroad Commission, that dedication or offering to the public was an unnecessary element anyway.

The position of the State Supreme Court as a general proposition of established law is supported by the cases cited in its opinion, and by a line of cases in the same matter under the law of eminent domain. The Court in the Thayer case states that the definition of public use is the same in both connections. The classical line of decisions in eminent domain holds that private use can never be the basis for exercising that power; that the use must be such as will be directly shared in by the public. This definition of public use, requiring a direct sharing by the public, of necessity eliminates enterprises in which the public as such has not shared nor been offered the right to share; and in so holding the Thayer case, so far as concerns the general proposition of law, laid down only what the California law has always been.[17]

But there is a line of cases in eminent domain following the decision of the Supreme Court of the United States in *Clark* v. *Nash*,[18] of a permissive nature, which (with certain qualifications) permits a state court, if it wishes, to adopt a different definition of public use. This is a comparatively recent departure, which holds that a private enterprise such as operating a mine or a sawmill, may be a public use where the State's physical conditions and the importance of the industry make success of such enterprises a public concern. The exact extent of this ruling has not

[17]Wiel, Water Rights in the Western States (3rd ed.) § 606.

[18](1905) 198 U. S. 361.

been fixed.[19] But of late it has been most resorted to outside of California in defining public use for irrigation.[20] *Clark* v. *Nash* was itself an irrigation case, where one man condemned a right in Utah to carry water through another's ditch for the irrigation of the former's private tract. If a private concern can be declared entitled to condemn for its individual use simply because of the ulterior public interest in the success of what it is doing, would not the same interest subject it to public control to see that its conduct shall continue to harmonize with that interest? The opinion in *Clark* v. *Nash* declared expressly that the water condemned for private irrigation in that case could be forced to be shared with other private irrigators on demand by them. The force spoken of was similar actions in eminent domain; yet the form of action is less important than the duty to share thus laid down. The ruling amounted to this: that (subject to qualifications left indefinite in that case) a state court may declare any use to be a public use if it thinks there is sufficient public interest in doing so, arising out of pressing physical conditions in the State. This may be new doctrine, but the Supreme Court of the country has approved it.

If it be that the contention of the Railroad Commission of California amounts to an adoption of the latter line of cases, then its conflict with the view of the Supreme Court can be readily understood. The California Supreme Court had never followed that definition of public use in eminent domain cases (and *Clark* v. *Nash* was permissive only and simply declared it would follow the State Court in whichever view it took). It is natural that its definition in the one matter should be the same as in the other. The Railroad Commission would be right as to what California might, if it were not already established, have included as "public use", and at the same time the Supreme Court would be right in what previous consistent decisions had, however, established upon the matter.

The German Alliance Insurance Case[21] upholding general public

[19]It has been said to be limited to cases of comparative insignificance. In Noble State Bank *v.* Haskell (1911) 219 U. S. 104 Justice Holmes said: "In the first place it is established by a series of cases that an ulterior private advantage may justify a comparatively insignificant taking of private property for what, in its immediate purposes is a private use," citing Clark *v.* Nash (1905) 190 U. S. 361; Strickley *v.* Highland Boy Gold Mining Co. (1906) 200 U. S. 527, 531; Offield *v.* New York N. H. & H. R. R. (1906) 203 U. S. 372; Bacon *v.* Walker (1907) 204 U. S. 311, 315.

[20]Wiel, Water Rights in the Western States (3rd ed.) § 609.

[21](1914) 233 U. S. 389.

interest as sufficient justification for public regulation of the rates of insurance companies, was likewise a case of upholding a local court (this time the local Federal Court). It differs from *Clark* v. *Nash* in not, however, affixing such a local condition to its meaning. It is general in its language. But the business of insurance was familiar to the court and the court described it at length from its own knowledge. The public interest was within the judicial notice: based upon common facts of every day knowledge. It hardly means that the Supreme Court at Washington will take judicial notice of how far private irrigation in which the public as such does not participate is clothed with a sufficient public interest in any particular part of the country. That is different in different places. The lack of the element of universality distinguishes irrigation from the insurance case. This is especially so when, in *Clark* v. *Nash,* the Supreme Court of the United States has already said that in irrigation matters, as in mining and the like, it will leave to the local tribunals to decide whether the sufficient degree of public interest exists in different connections. Consequently, to repeat, the Railroad Commission of California would be right in saying that "dedication" is not in the nature of things essential to "public use", and the Supreme Court of California would be right in holding that it has always been necessary in California.

The definition of public use being a question of law, can the legislature change it? It has enacted in California, as already quoted, that any person who furnishes water to any other person is a public utility, and the constitution of that State says that the legislative power in such matters is "plenary" and "unlimited". Likewise whether a given concern is within any definition of public use is a question of fact,[22] as is also the question whether its rates, rules and service are reasonable,[23] and the legislature with its power so declared to be "plenary" has enacted that the findings of the Railroad Commission upon questions of fact shall be conclusive.[24] Does this let the cat out of the bag again? In a later case[25] the question whether a certain concern was serving

[22]Lindsay Irrigation Co. *v.* Mehrtens (1893) 97 Cal. 676.

[23]Reasonableness is a question of fact. Lukrawka *v.* Spring Valley Co. (Cal. 1915) 146 Pac. 640; Raywood etc. Co. *v.* Erp & Wright (1912) 105 Tex. 161; Granger *v.* Kishi (Tex. Civ. App. 1911) 139 S. W. 1002; Colorado Canal Co. *v.* McFarland & Southwell (1908) 50 Tex. Civ. App. 92; Shafford *v.* White Bluffs etc. Co. (1911) 63 Wash. 10.

[24]Cal. Stat. 1911, extra sess. p. 18, sec. 67; Cal. Stat. 1915, p. 115, sec. 67.

[25]Del Mar Water etc. Co. *v.* Eshleman (1914) 167 Cal. 666.

a public use caused a division of opinion among the judges. The decision was against the Railroad Commission's jurisdiction over it. The Commission petitioned for a rehearing, and in a brief by *amicus curiæ* it was urged that it was essential for the court to decide what the bearing of the latter point was. Denying the petition, the court said of its ruling (italics by the court):—"It merely declares that the land of the claimant, Glass, is not, *and is not found by the Commission to be* within the district or area, to the use of which the water owned or controlled by that company is dedicated. . . ." The court thus found that the record did not require determination of the question in that case; it recognized the importance of it, and left it open. The writer of that brief in urging the pertinence of the question did not himself undertake therein to answer it, and the answer lies beyond the scope of his article here, which speaks of what was in the past and does not assume to say what will be hereafter.[26]

Between the Supreme Court of the State and the United States Circuit Court of Appeals, on the other hand, the difference is upon other lines than those yet noted. The arrangements of the project were accepted by the State Court as having removed the Development Company, through the interposition of certain other agencies, from any contact with the public as such. Sometimes it is figuratively said that the former was considered a "wholesaler", leaving any public service solely to the "retailers", who were in the Thayer case held not to be in public service either.[27] The Federal Court declared this arrangement on the facts presented was a makeshift to avoid the legal result of what was being done in substance; that the Development Company was supplying the public as a matter of fact, through its own agencies. To ordinary observation, viewing a county of extended area, that

[26]There is room for argument on both sides, and it would grow into a discussion of considerable length. See Employers' Assurance Corporation *v.* Industrial Accident Commission (Cal. 1915) 151 Pac. 423.

[27]The Railroad Commission says: "There is nothing in the world to prevent an electric company from developing its power and forming other companies which shall deliver the power for lighting and mechanical purposes, and agreeing only with these companies and no others as to the delivery of power. And such agreements, if the doctrine announced in the Thayer case and in this case is to be followed in determining whether present constitutional provisions are good, will be beyond the power of this Commission to scrutinize and we shall be forced to start with a wholesale rate which the parent company fixes for its offspring, which shall be figured in the rate to the public which must be allowed to be charged by the distributing company, and which must be used as a starting point when this Commission proceeds to fix rates which are to be imposed upon the public." Brief of Railroad Commission in Del Mar etc. Co. *v.* Eshleman, Cal. Sup. in Bank, L. A. #3533.

came into being, grew up and was made into a county solely as a result of this project, and with a population of fourteen thousand dependent upon the California Development Company for its water supply, it is hard to picture that the concern is not supplying the public. Most of us, believing in public control of public service agencies, must sympathize with Judge Morrow's handling of this concern. This is apart from the much-mooted question of the "water-right charge". Apart from that, and simply on the question of "public use", it is hard not to believe that he did look through the shadow of typewritten papers and saw correctly the public use that lay beyond in substance. That the form in which a project is cast may be disregarded if it is producing a result inconsistent with that form is held by the Supreme Court of the United States in the cases regulating oil pipe lines. In the words of the Chief Justice, concurring:—[28] "In other words, were doing in reality a common carrier business, disguised, it may be, in form, but not changed in substance. Under these conditions I do not see how it would be possible to avoid the conclusion which the court has reached without declaring that the shadow and not the substance was the criterion to be resorted to."

This does not mean that "wholesalers" of the supply are invariably in public service. Whatever may be a general rule as to that,[29] the meaning of the Federal Court is but that in the state of affairs under discussion, the facts did not present that question, but another one, aptly phrased as follows:—"But that is merely the not infrequent occurrence of a party bringing about the facts and attempting to prohibit their legal consequence. This, of course, he cannot do."[30] Or, in other words, the dedication or holding out to the public which is necessary under the California law to constitute public use may be shown by conduct as much as by word of mouth, and, as actions speak even louder than words, conduct may amount to a holding out to the public even against many words denying it.

SAMUEL C. WIEL.

SAN FRANCISCO, CAL.

[28]United States *v.* Ohio Oil Co. (1914) 234 U. S. 548, at p. 563.

[29]See the following California cases tending to a general rule in that court that the interposition of the second agency removes the first agency from the character of a public service company: Garrison *v.* North Pasadena Land etc. Co. (1912) 163 Cal. 235; Thayer *v.* California Development Co. (1912) 164 Cal. 117; Del Mar Water Co. *v.* Eshleman (1914) 167 Cal. 666; Marin Water Co. *v.* Town of Sausalito (1914) 168 Cal. 587; Escondido Mutual Water Co. *v.* City of Escondido (Cal. 1915) 147 Pac. 1172.

[30]Thomas *v.* Mattehiessen (1914) 232 U. S. 221.